Tan Kim Hong v Keng Heng Investment Pte Ltd & Anor

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 360 OF 1989
SINNATHURAY J
31 OCTOBER 1990

Family Law — Matrimonial home — Division of proceeds of sale — Application for deductions from wife's share — Women's Charter (Cap 353, 1985 Ed), ss 56, 106(1) & 2(b)

Civil Procedure — Res judicata — Previous order of court made without knowledge of certain facts — These facts introduced in present proceedings — Whether res judicata applies

The plaintiff and second defendant were wife and husband respectively in this dispute concerning the division of proceeds of sale of the matrimonial home. The purchase price of the home was $390,000 of which $300,000 was contributed by the husband's father. The husband, however, obtained a mortgage of $210,000 secured on the home. In 1988, the wife discovered that the husband had sold the matrimonial home and applied to court in Originating Summons No 655 of 1988 to protect her interest in the matrimonial home. Her first two prayers in the suit were granted: declarations that the property in question was the matrimonial home of the parties, and that the husband, as registered proprietor, held the property on trust for himself and the wife as tenants-in-common in equal shares. However, no order was made in respect of two other prayers: an order that the husband transfer a half share of the property to the wife failing which the registrar be empowered to execute the transfer, and an order that alternatively, should there be a sale before such transfer, an order that the wife receive half of the net proceeds of sale direct from the purchaser of the property. As a result, the husband was unable to proceed with the sale and was ordered to pay damages exceeding $80,000 to the intending purchaser of the home. Later, the mortgagees sold the property and the wife received $40,000 from the proceeds of sale. The husband then applied to court in this suit for deductions to be made from the wife's share as he had incurred expenses and debts in purchasing and improving the property which were contracted for their joint benefit. It was submitted for the wife that her share could not be varied; res judicata applied to the parties as they were bound by the order of court made in the 1988 originating summons, and no deductions should be made. The parties were divorced in 1990.

Held, dismissing the husband's claim:

(1) The declaratory orders in OS 655 of 1988 simply stated that the property was matrimonial property and that it was held by the parties as tenants-in-common in equal shares. But the issue for determination as to how the final distribution of the matrimonial property was to be made was not considered or dealt with. No evidence was adduced that the property was mortgaged or of the circumstances of the mortgage, nor was there any reference to the sale of the property by the husband. As these matters are relevant to the issues for determination now, res judicata does not apply.

(2) The parties are divorced but no mention is made of what ancillary matters were dealt with. However, as there is an issue relating to the matrimonial property, the court has power to decide on the division of the property between the parties, in this case the proceeds of sale of the property. The law to be applied in this case is found in s 106 of the Women's Charter (Cap 353, 1985 Ed).

(3) In the exercise of its power the court must have regard to s 106(2)(b) of the Women's Charter and consider whether any debts are owing by either party which were contracted for their joint benefit. The husband obtained a mortgage of $210,000 on the property while he needed only $105,000 to purchase the property. Thus the excess sum was for his own personal benefit. The husband's claim for deductions to be made from the wife's share in respect of improvements and renovations to the home, payments made by the husband from a fixed deposit account, damages payable out of the abortive sale of the property, overdrafts, legal fees and costs payable by the husband to the wife in OS 655 of 1988, is dismissed with costs.

Legislation referred to
Women's Charter (Cap 353, 1985 Ed) ss 56, 106(1),(2)(b)

Chandra Mohan s/o K Nair for the plaintiff.
Beh Eng Siew for the first defendant.
Tan Jee Ming (Derrick Wong Ong Eu with him for the second defendant.

Cur Adv Vult

Sinnathuray J: In this originating summons commenced by Singapore Finance Ltd as plaintiffs, the application was in the nature of interpleader proceedings. The first defendants were Keng Heng Investment Pte Ltd ('Keng Heng'); the second defendant was Chin Pek Chan; and the third defendant was Tan Kim Hong.

In the course of the proceedings, several matters were resolved. At this hearing, the third defendant, Tan Kim Hong, is the plaintiff, and the second defendant, Chin Pek Chan, is the sole defendant. They are husband and wife. I will refer to them as the parties in these proceedings.

The parties were married in London on 3 July 1976. They had an unhappy marriage. The marriage was dissolved recently on 15 March 1990. The dispute in these proceedings concerns the matrimonial property, No 18 Leedon Heights #06-07, Singapore 1026.

The parties came to live in Singapore in August 1979. The husband was employed as the general manager of Cairnhill Hotel at No 19 Cairnhill Circle. The wife worked as the personal assistant to the managing director of the hotel. They lived at No 8 Watten Drive.

Almost within two years of their living in Singapore, the marriage broke down. The husband began to neglect the wife from around May 1981. It appears from the affidavit evidence that the husband married a woman in Johore in July 1983 and there is a child from that union born in February 1984. Effectively, the husband had deserted the wife by 10 September 1984.

At this time, the husband's father came into the picture. He gave $300,000 to assist the parties to purchase the matrimonial property at No 18 Leedon Heights. The property was purchased for $390,000 and

put in the husband's name. He then mortgaged the property to Singapore Finance Ltd, the original plaintiffs in these proceedings. The husband made himself responsible for making the mortgage payments.

At the hearing, counsel for the wife drew my attention to the documentary evidence that the property has been mortgaged by the husband for $210,000 when, in fact, his father had contributed $300,000. Taking into account disbursements and other expenses, counsel said, it was not necessary for the husband to take out such a large mortgage on the matrimonial property, for the purchase of it.

The wife, in an affidavit filed in Originating Summons No 655 of 1988, affirmed the following facts:

(1) She had expended $27,534 for renovation and equipped the matrimonial house with the necessary furniture and fittings. She said that she used her savings and earnings. There is an itemized account of the sum of $27,534.
(2) From 8 June 1985, she paid all rates, maintenance fees and outgoings which are itemized and total $13,357.
(3) From September 1984, she contributed towards her son's schooling and helped to pay some of her husband's debts, which again are itemized, and they total $16,304.
(4) Apart from sporadic contributions from the husband which ended in November 1987, the husband has failed to adequately maintain her son and her for the past four years.

Next, sometime in the middle of 1988, the husband admitted the sale of the matrimonial property to Keng Heng, the first defendants. The wife had not been consulted in the matter. It was when she came to know of the sale that she commenced proceedings in Originating Summons No 655 of 1988 and filed the affidavit I have referred to. In that originating summons, the wife claimed, inter alia, the following reliefs:

(1) A declaration that the property 18 Leedon Heights, #06-07, Singapore 1026 is the matrimonial home of the plaintiff and the defendant.
(2) A declaration that the defendant, who is the registered proprietor, holds the property in trust for the plaintiff and the defendant as tenants-in-common in equal shares.
(3) An order that the defendant executes a transfer of one-half share of the property to the plaintiff failing which the Registrar of the High Court shall be empowered to execute any or all deeds relating to the transfer.
(4) Alternatively, should there be a sale before the transfer as ordered in para 3, an order that the plaintiff shall receive one-half of the net proceeds of sale direct from the purchasers of the property.

At that time, the husband was in Kuala Lumpur. The wife obtained an order of court for substituted service and the originating summons was served by way of an advertisement in the New Straits Times circulating in West Malaysia. Also, as at that time, the husband was represented by solicitors in Singapore, it was submitted for the wife that they and the husband would have known or ought to have known of the proceedings which the wife had commenced.

When the matter came on for hearing on 16 September 1988, the husband failed to attend court nor was he represented by counsel. On the affidavit evidence, portions of which I have earlier referred to, the learned Chief Justice made an order in terms of paras (1) and (2) of the originating summons. I pause here to observe for it becomes significant later, when I deal with the submission relating to res judicata, that no order was made on paras (3) or (4) of the originating summons. To continue, the Chief Justice also ordered the husband to pay the costs of and incidental to the application and gave liberty to apply.

Before me, counsel for the wife stressed that the husband has neither appealed against the order nor taken any steps, under the liberty to apply provision, to set aside the order made in favour of the wife.

The result of the order was that the husband was unable to proceed with the sale of the property. Instead, Keng Heng sued the husband. A judgment was entered against him and damages were settled in the sum of $80,769.75 which the husband had to pay.

The next step taken was that the mortgagees, Singapore Finance Ltd, sold the property. The contract for sale was made in January 1989, and the sale and purchase was completed in April 1989. These proceedings are a consequence of that transaction.

Before I consider the itemized issues raised by the husband, I must deal with the general submission made on behalf of the wife that res judicata would apply to the parties, as they are bound by the order of court made by the learned Chief Justice in the earlier originating summons.

Now, that originating summons was made under s 56 of the Women's Charter (Cap 353, 1985 Ed), and, as I have already said, the declaratory orders obtained were that the property was matrimonial property and that the property was held by the parties as tenants-in-common in equal shares. That was all. The issue for determination between the parties as to how the final distribution of the matrimonial property was to be made was not considered nor dealt with by the Chief Justice. There was no evidence before the Chief Justice that the property was under mortgage, or for that matter, the circumstances of the mortgage. There was also no refer-

ence to the sale of the property by the husband to Keng Heng. They are matters that have been referred to in these proceedings and are relevant to the issues for determination now. For these reasons I reject the submission made for the wife that res judicata applies to the issues before me.

In my view, the law to be applied in this case is s 106 of the Women's Charter. Having regard to the order made by the Chief Justice, that the matrimonial property was held in trust for the husband and wife as tenants-in-common, the property having been sold, the question now arises as to how the distribution is to be made of the purchase price, after payment of the moneys due to the mortgagees. For the present purpose, I need only refer to s 106(1) and (2) of the Women's Charter. They read as follows:

> (1) The Court shall have power when granting a decree of divorce, judicial separation or nullity of marriage, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.
> (2) In exercising the power conferred by subsection (1) the Court shall have regard to —
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> (a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;
> (b) any debts owing by either party which were contracted for their joint benefit; and
> (c) the needs of the minor children (if any) of the marriage,
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> and, subject to those considerations, the Court shall incline towards equality of division.

As I have said, the parties are divorced. I do not know what ancillary matters have been dealt with since then. However, as there is an issue relating to the matrimonial property, I am of the view that I have the power to decide on the division of the property between the parties, in this case the proceeds of sale of the property. In exercising that power, I must have regard to s 106(2)(b), any *debts* owing by either party which *were contracted for their joint benefit.* So, on the issues before me, what I have to decide is whether any of the debts owing can be said to be debts incurred or contracted by the parties for their joint benefit.

Here, I must reiterate the relevant facts. The matrimonial property was bought for $390,000, $300,000 of which was given by the husband's father, after the marriage of the parties was on the rocks. Counsel for the wife said, and I agree with him, that it would be fair to add a sum of $15,000 for disbursement, etc for the purchase of the property. Given that the property would cost $405,000, the husband would have required another $105,000 to purchase the property. What he did, however, was to obtain by way of mortgage the sum of $210,000. This was more than he needed for the purchase of the property. So, the excess of over $100,000 was for his own personal benefit.

In more recent times, there are other sums of money which the husband has benefitted from. He has retained $38,000, the 10% deposit which he received from Keng Heng. From the mortgage sale, he received $80,769.75. Together with the sum of over $100,000 from the mortgage, the husband has benefitted in moneys worth well in excess of $200,000. On the other hand, one of the matters that was settled in the course of these proceedings was that the wife received $40,000 from the sale proceeds of the property. It is in these circumstances that counsel for the wife submitted that no further deductions should be made in favour of the husband on the items which are in issue.

Having set out the background facts, I now come to consider each of the items raised by counsel for the husband:

(1) Item 1 is for $5,000 which the husband claims he expended for renovation and improvement to the property. First, there is no documentary proof of the expenditure. Secondly, the wife, who has an itemized account of $35,000 for renovation, furniture and fittings, makes no claim for that sum. I think it is petty of the husband to make a claim in this regard. Thirdly, as a matter of law, renovation expenses that were incurred were for the benefit of the property for they had enhanced the value of the property. Now that the property has been sold at a profit, this sum of $5,000 is not properly claimable by the husband. Likewise, item 2 of $14,000 which the husband claims he incurred for household expenses, including TV, hi-fi, furniture and general improvements to the matrimonial property are also not allowed.

(2) Item 3 is for $10,000, a fixed deposit which the husband had with Singapore Finance Ltd from which deductions were made when he was late in payment of his mortgage payments. For the reason that the husband has substantially benefitted from the mortgage he took on the property, this deduction is disallowed.

(3) Item 4, the sum of $2,500 as maintenance fees due to the management corporation has been abandoned.

(4) Items 5 and 6 can be considered together because they deal with the sale by the husband of the property to Keng Heng. Item 5 of $7,660 is supposedly payment of brokerage fees for the abortive sale and item 6 is for $80,769.75 for damages which the husband had to pay to Keng Heng. In giving the background, I have said that the husband sold the property without telling his wife of it. If the wife had not taken out the process in OS No 655 of 1988, counsel for the wife said that it may well be that she

would have been left penniless. Moreover, it is to be borne in mind that the husband had deserted the wife and had not taken care of her and the son for many years. Therefore, I am of the view that no deduction should be made in his favour for the damages he has had to pay to Keng Heng nor is the wife liable for any payment of brokerage fees if such a claim should be made in the future.

(5) Item 7 is for $75,000, a sum allegedly taken by the husband on an overdraft from the United Overseas Bank for his business in Malaysia. The wife wholly protests that such a claim should be made. She has no knowledge that moneys were taken for business by the husband. There is also no documentary evidence of the claim. This item must be rejected.

(6) Item 8 of $5,000 is for legal fees payable by the husband to his solicitors for this case. The wife makes no similar claim. Much as I sympathize with the position of the husband now, this claim has no merit.

(7) Finally, there is item 9: $5,662.85 for costs payable by the husband to the wife in OS No 655 of 1988. The Chief Justice had ordered that costs of and incidental to the application be paid by the husband. It means that the husband must personally bear the costs, not that it is to be deducted from any common property owned by the parties. In the sum of $5,662.85 is included the costs incurred for the charging order made consequent upon the Chief Justice's Order. That, too, must be borne by the husband personally.

On the determinations made on the specific issues raised in this hearing, the application of the husband is dismissed with costs.

Application dismissed.

Solicitors: *Tan Rajah & Cheah; YM Jumabhoy & Co; Derrick Jeffrey & Ravi.*

Reported by *Azra Moiz*

MALAYSIAN REPORTS

Tang Hee Hing v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 43 OF 1986
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF AND GUNN CHIT TUAN SCJJ
25 JANUARY 1991

Criminal Procedure — Plea — Qualified plea — Plea of guilty to charge of trafficking in dangerous drug — Accused convicted on plea of guilty and evidence of prosecution — Mandatory death sentence — Court must be satisfied that plea is unequivocal — Meaning of plea of guilty

The appellant in this case had been tried with another co-accused on two charges of trafficking in raw opium. At the end of the prosecution case the other accused was acquitted but the appellant was called to enter his defence. In his evidence the appellant denied the statement he had made in a cautioned statement which had been admitted but in cross-examination said: 'Even until today I am prepared to plead guilty if the second accused could be released. I do so because I do not want her to get involved. As the opium belong to me. No one advised me to plead guilty.' The appellant was convicted and sentenced to death. He appealed.

Held, ordering a retrial:

(1) In his grounds of judgment the judge convicted the appellant based on the appellant's supposed plea of guilty and the evidence of the prosecution and not on the evidence alone. Before a plea of guilty could be accepted by the court, the court must be satisfied that the plea is unequivocal. In this case it is clear that the plea is a qualified plea and when the plea is not clear, doubtful or qualified, it should not be accepted as a plea of guilty.

(2) Where capital punishment is involved, it must clearly be shown that the accused knew not only the nature of his plea but also the nature of punishment he was liable to receive as a consequence of his plea.

(3) The real meaning of a plea of guilty is that the accused agrees to all the ingredients of the offence and all the averments in the charge.

[Bahasa Malaysia summary

Perayu di dalam kes ini telah dibicarakan bersama dengan seorang tertuduh lain atas dua tuduhan mengedar candu mentah. Apabila tamat kes bagi pihak pendakwa, tertuduh yang satu lagi itu telah dibebaskan akan tetapi perayu telah diminta membela dirinya. Di dalam keterangannya perayu telah menafikan pernyataan di dalam pernyataan beramaran yang dibuat olehnya dan yang telah diterima akan tetapi di dalam pemeriksaan balas ia berkata:

'Hingga hari ini pun saya bersedia mengaku salah jika tertuduh kedua dibebaskan. Saya membuat demikian oleh kerana saya tidak mahu ia dibabitkan. Oleh kerana candu itu saya yang punya. Tidak sesiapa pun menasihatkan saya supaya mengaku salah.'

Perayu telah disabitkan dengan kesalahan itu dan dihukum mati. Ia telah merayu.

Diputuskan, memerintahkhan perbicaraan semula:

(1) Di dalam alasan penghakimannya, hakim yang arif telah mensabitkan perayu atas pengakuannya yang disangkakan itu dan keterangan pihak pendakwa dan bukan atas keterangan sahaja. Sebelum sesuatu pengakuan bersalah boleh diter-